

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY S. WALMSLEY, JR.,

Defendant-Appellant.

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UNPUBLISHED

October 1, 1999

No. 205967

Recorder's Court

LC No. 96-502886

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to natural life without the possibility of parole for the first-degree murder and felony murder convictions and two years' imprisonment for the felony-firearm conviction. We affirm the convictions of and sentences for first-degree murder and felony-firearm but remand for the ministerial task of correcting the judgment of sentence.

I

Defendant argues that the prosecution failed to present sufficient evidence to support the first-degree murder convictions. When ascertaining whether sufficient evidence was presented at trial to support a conviction, a Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and

deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look, *id.*, and “characterize a thought process undisturbed by hot blood,” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971). Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation. *Plummer, supra* at 301. The prosecution need not negate every reasonable theory consistent with the defendant’s innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant argues that the evidence presented at trial did not establish that the shooting was premeditated, but rather indicated that the shooting was an act of impulse. We disagree.

The medical examiner testified that the victim died of multiple gunshot wounds. The victim sustained three gunshot wounds, one to his back, one to his shoulder, and one to the left side of his face. The wound to the victim’s face was the result of close-range firing, caused extensive brain damage, and would have been immediately incapacitating. The victim would not have been able to drive any distance after receiving this injury. One of the other wounds was severe, but would not have caused immediate death and would have allowed the victim to function for a few minutes after it occurred.

Other witnesses at trial testified that defendant was on the sidewalk when the victim came by in his car. Defendant called out something, and the victim stopped his car. Defendant approached the car and asked what the victim wanted. Then defendant pulled out his gun. The victim began to drive away. Defendant pointed his gun at the car and fired approximately five times. The victim crashed into a barricade at the end of the street, approximately one hundred yards away. Defendant approached the car and went through the victim’s pockets. When he finished, he fired at the victim three more times.

The prosecutor argued that the gunshot wound to the victim’s face occurred after the victim crashed into the barricade. Viewing the evidence in a light most favorable to the prosecution, a reasonable factfinder could so find. Thus, defendant had ample opportunity to take a second look while traveling approximately one hundred yards to where the victim’s car had crashed. Accordingly, sufficient evidence was presented to establish that the killing was premeditated and deliberated. Cf. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979) (finding sufficient evidence of premeditation where the defendant pursued the victim from a parking lot into a restaurant).

## B

The elements of first-degree felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *People v Warren*, 228 Mich App 336, 346-347; 578 NW2d 692 (1998). Malice may be inferred

from the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995).

Defendant argues that there was insufficient evidence to establish that the killing was committed in the perpetration of a larceny. Defendant notes that the \$20 bill that the victim had been holding was found in the car. Defendant further contends that defendant's act of searching the victim's pockets was an afterthought.

We conclude that sufficient evidence was presented to support a conviction of first-degree felony murder. When the victim stopped his car to speak with defendant, he had a twenty dollar bill in his hand. After the his car crashed into the barricades, defendant leaned through the driver's window and searched the victim's pockets. When defendant finished going through the victim's pockets, he shot the victim three more times. In defendant's written statement, he wrote, "We was gonna rob him . . . ." Viewing the evidence in a light most favorable to the prosecution, the jury could rationally have found that defendant shot the victim while in the process of committing or attempting to commit a larceny.

## II

Defendant also argues that dual convictions of both first-degree premeditated murder and felony murder for the death of a single victim violate double jeopardy. Defendant asserts that, pursuant to *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998), he is entitled to a remand for amendment of the judgment of sentence to specify that he was convicted of one count of first-degree murder supported by two theories: premeditated murder and felony murder. The prosecutor agrees, as do we.

Defendant's convictions of and sentences for first-degree murder and felony-firearm are affirmed. However, we remand for the limited purpose of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Jeffrey G. Collins  
/s/ David H. Sawyer  
/s/ Mark J. Cavanagh